U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-H-N-C- INC.

DATE: OCT. 25, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of landscaping services, seeks to employ the Beneficiary as a landscaper. It requests his classification under the third-preference, immigrant category as an "other worker." *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring less than two years of training or experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position's proffered wage.

On appeal, the Petitioner submits additional evidence. It also argues that its payments to the Beneficiary, a depreciation deduction on its income tax returns, and a totality of circumstances demonstrate its ability to pay the proffered wage.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker generally follows a three-step process. To permanently employ a foreign national in the United States, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that the United States lacks an able, willing, qualified, and available worker for a position, and that employment of a foreign national will not harm the wages or working conditions of U.S. workers in similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets DOL-certified job requirements of a position and qualifies for the requested immigrant visa classification. If USCIS approves a petition, a beneficiary may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). If, as in this case, a petitioner employs less than 100 people, evidence of its ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

To determine ability to pay, USCIS examines whether, in relevant years, a petitioner paid a beneficiary a full proffered wage. If a petitioner did not annually pay a full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any differences between a proffered wage and wages it paid a beneficiary. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the labor certification states the proffered wage of the offered position of landscaper as $25,043 a year. The petition's priority date is May 1, 2018, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner employed the Beneficiary as a temporary nonimmigrant worker for part of 2018. A copy of an IRS Form W-2, Wage and Tax Statement, for that year indicates that the company paid him $15,573.24. That amount does not equal or exceed the annual proffered wage of $25,043. Therefore, based solely on wages paid, the Petitioner has not demonstrated its ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. In 2018, the company need only demonstrate its ability to pay the difference between the annual proffered wage and the actual wages paid, or $9,469.76.

A copy of the Petitioner's federal income tax return for 2018 reflects net income of $540 and a negative amount of net current assets.[2] Neither of those amounts equals or exceeds the $9,469.76 difference between the proffered wage and wages paid that year. Thus, based on examinations of the wages the Petitioner paid and its amounts of net income and net current assets, the record does not demonstrate its ability to pay the proffered wage in 2018.

On appeal, the Petitioner notes that it paid the Beneficiary almost the full proffered wage of $25,043 in 2017. A copy of an IRS Form W-2 for that year indicates that the company paid him $24,232.05.

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[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 **4-5 (D.S.C. Sept. 9, 2016).

[2] The Petitioner chose to be treated as an S corporation on its 2018 federal income tax return. The company reported additional income, deductions, and adjustments on Schedule K of IRS Form 1120S, U.S. Income Tax Return for an S Corporation. We therefore consider the income reconciliation amount on line 18 of Schedule K to reflect the Petitioner's net income for 2018. *See* U.S. Internal Revenue Serv. (IRS), Instructions for Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (last visited Oct. 8, 2019) (describing Schedule K as a summary of shareholders' shares of an S corporation's income, deductions, credits, etc.).

Contrary to 8 C.F.R. § 204.5(g)(2), however, the wages the Petitioner paid the Beneficiary in 2017 do not establish the company's ability to pay him in 2018, the year of the petition's priority date.

The Petitioner also argues that it paid the Beneficiary nearly the proffered wage rate in 2018. The Petitioner asserts that it need only pay the portion of the proffered wage occurring after the petition's priority date of May 1 that year. The annual proffered wage of $25,043 equals about $2,087 a month. The Petitioner therefore contends that the proffered wage rate for the eight-month period in 2018 after the priority date is about $16,695. As previously indicated, the Petitioner paid the Beneficiary $15,573.24 in 2018, only about $1,122 below the prorated, eight-month proffered wage.

Contrary to the Petitioner's argument, however, USCIS policy does not permit a petitioner to prorate a proffered wage. USCIS will consider the effect of a short period between a priority date and the end of a year in the Agency's totality-of-the-circumstances analysis. But a petitioner must demonstrate its ability to pay the full proffered wage in each relevant year, including the year of the priority date. Moreover, even if USCIS policy allowed proration of the proffered wage, the Petitioner would still fall $1,122 short of the prorated wage. The Petitioner asserts that the combination of its net income and its forbearance of $410 in charitable contributions in 2018 could have covered the shortfall. But the Petitioner generated net income of only $540 that year. *See* n.2 (explaining the applicable net income amount for S corporations). The combination of the Petitioner's net income and its forbearance of the charitable contributions therefore would not have established its ability to pay the proffered wage in 2018.

In addition, the Petitioner contends that a recent law allowed it to deduct 100% of $222,610 in business property that it acquired and placed in service in 2018. The Petitioner submitted copies of IRS documentation indicating that, under prior law, the company could have deducted only half that amount in 2018. *See* U.S. Internal Revenue Serv. (IRS), "Tax Cuts and Jobs Act: A comparison for businesses," https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses#passthrough (last visited Oct. 9, 2019). The Petitioner therefore argues that it would have had more than $100,000 available to pay the proffered wage in 2018.

USCIS, however, does not consider depreciation as evidence of a petitioner's ability to pay a proffered wage. Rather, depreciation reflects a cost of doing business, representing the loss in value of business property or equipment over time. Thus, depreciation does not reflect funds available to pay a proffered wage. *See River St. Donuts*, 558 F.3d at 118 (finding that, in determining a petitioner's ability to pay, we rationally rejected the inclusion of depreciation in its net income). The Petitioner's argument therefore does not persuade us.

As the Petitioner also contends, however, we may consider factors other than its wages paid, net income, and net current assets in determining its ability to pay. Under *Sonegawa*, we may consider: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's proposed replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1994 and its employment of 48 people. Copies of the Petitioner's federal income tax returns also indicate that its annual revenues grew from 2015 to 2018. Unlike the petitioner in *Sonegawa*, however, the record does not establish the Petitioner's incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate that the Beneficiary would replace an existing employee or outsourced service. Thus, a totality of circumstances under *Sonegawa* does not demonstrate the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not demonstrate the Petitioner's continuing ability to pay the position's proffered wage from the petition's priority date onward. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

Cite as *Matter of I-H-N-C- Inc.*, ID# 6523682 (AAO Oct. 25, 2019)